1989

Roland Webb v. R.O.A. General, Inc., a Utah corporation, William Reagan, individually, and William Adams, Esq., individually and Douglas T. Hall, Esq., individually: Appellants' Reply Brief

Utah Court of Appeals

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49164-CA

IN THE COURT OF APPEALS OF THE STATE OF UTAH

ROLAND WEBB, Plaintiff-Respondent, vs. R.O.A. GENERAL, INC., a Utah corporation, WILLIAM REAGAN, individually, and WILLIAM ADAMS, ESQ., individually, and DOUGLAS T. HALL, ESQ., individually, Defendants-Appellants	)	No. 890164-CA Category 14(b)

APPELLANTS' REPLY BRIEF

On Appeal From the Judgment of the
Third Judicial District District for
Salt Lake County, State of Utah

Honorable James S. Sawaya, Judge

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ROLAND WEBB, Plaintiff-Respondent, vs. R.O.A. GENERAL, INC., a Utah corporation, WILLIAM REAGAN, individually, and WILLIAM ADAMS, ESQ., individually, and DOUGLAS T. HALL, ESQ., individually, Defendants-Appellants	)	No. 890164-CA Category 14(b)

APPELLANTS' REPLY BRIEF

SUMMARY OF ARGUMENT

Utah statutory and case law provide that in cases of breach of a corporate director's fiduciary duty to the corporation, the pertinent statute of limitations begins to run only after the aggrieved party discovers, or should have discovered, the tortious conduct and the resulting damage or injury. The determination of when the statute of limitations began to run on defendant's cause of action based upon plaintiff's alleged tortious conduct is a matter best left to the trier of fact. The record demonstrates genuine issues of fact exist as to whether the disclosure allegedly made by plaintiff put defendants on notice of plaintiff's usurpation of a corporate opportunity. The trial court erred in holding as a matter of law that defendants' cause of action for breach of plaintiff's fiduciary duty as a corporate officer was barred by the statutes of limitations.

ARGUMENT

POINT I.

DEFENDANTS-APPELLANTS ABANDON POINT II RAISED IN APPELLANTS' INITIAL BRIEF.

Based upon the representations made by respondent-plaintiff in Point I of his brief, defendants-appellants hereby abandon their argument that plaintiff waived any right to rely upon the statute of limitations set forth in Utah Code Annotated §78-12-27.

POINT II.

THE TRIAL COURT ERRED IN RULING AS A MATTER OF LAW THAT DEFENDANTS' CLAIM FOR USURPATION OF A CORPORATE OPPORTUNITY WAS BARRED BY THE PERTINENT STATUTE OF LIMITATIONS.

Plaintiff asserts that it is undisputed that he disclosed to the directors of Galaxy Advertising his acquisition of an equity interest in Palmer Outdoor Advertising. Respondent's Brief, pp. 7-10. Plaintiff's argument, however, misses the mark. The pertinent statute of limitations, Utah Code Ann. §78-12-27, provides:

> Actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created, by law must be brought within three years after the discovery, by the aggrieved party, the facts upon which the penalty or forfeiture attached, or the liability accrued. (emphasis added).

The Utah Supreme Court in Jones Mining Co. v. Cardiff Mining & Milling Co., 56 Utah 49, 191 P. 426, 429 (1920), clearly held that in cases of breach of a corporate director's fiduciary duty to the corporation, the statute of limitations begins to run from the time

the complaining party "discovered the wrongs complained of or when he was apprised of such facts and circumstances with respect thereto as would put a person of ordinary intelligence and prudence upon inquiry."

A crucial issue of material fact exists in this appeal with regard to the nature of the disclosure allegedly made by respondent to the directors of Galaxy. Defendants respectfully submit that the record on appeal demonstrates the existence of a genuine issue of material fact as to the disclosure made by plaintiff. The nature of the disclosure made by plaintiff will, in turn, determine whether defendants or defendants' predecessors in interest knew, or should have known, of the corporate opportunity of which plaintiff undisputedly availed himself.

The Utah Supreme Court in Christiansen v. Rees, 20 Utah 2d 199, 436 P.2d 435 (1968), recognized in applying the discovery doctrine in statute of limitations cases, that the determination of when a party knew, or should have known, of a legal injury is a matter to be resolved by the trier of fact. In Christiansen, defendant performed an operation on plaintiff in 1955. Apparently, during the course of the operation, defendant left a broken surgical needle inside plaintiff's body. Plaintiff did not file suit until 1965 when he discovered the presence of the needle. Defendant moved for summary judgment claiming that plaintiff's claims were barred by a four-year statute of limitation. Plaintiff unsuccessfully resisted the motion by asserting that the statute of limitations should not begin to run until the date he discovered

the presence of the foreign object in his body. The trial court granted summary judgment in favor of defendant.

On appeal, the Utah Supreme Court held that the pertinent statute of limitations in Christiansen did not begin to run until the plaintiff had notice of the presence of the needle in his body. In applying the discovery rule to the facts of the case, and reversing and remanding the action back to the trial court, the court stated:

> In the instant case, there is serious question as to whether, even in applying the discovery doctrine, the action is barred by the four-year statute of limitations. However, upon the record it is our judgment that the question of whether the plaintiff commenced his action within four years after he knew, or should have known, of the presence of the surgical needle in his body is an issue to be resolved by the trier of the facts.

Christiansen, 436 P.2d at 437 (emphasis added).

Likewise, other jurisdictions have recognized that whether the discovery rule tolls a statute of limitations is a matter best left to the trier of fact. In O'Hara v. Kovens, 305 Md. 280, 503 A.2d 1313 (1986), the court reversed the entry of judgment in favor of defendants on the basis of a statute of limitations defense. In O'Hara, plaintiff sued defendants for fraud in connection with the sale of certain stock in December, 1971. Plaintiff's complaint was not filed until late 1978. Plaintiff's suit was governed by a three-year statute of limitations. Defendants moved for summary judgment based on the statute of limitations defense. The trial court granted defendants' motion, finding as a matter of law that

plaintiff had notice of defendants' alleged fraudulent conduct more than three years prior to the filing of their complaint. In reversing the entry of judgment as a matter of law in favor of defendants, the Maryland Court of Appeals stated:

> Both the trial court and the Court of Special of Appeals correctly recognized that the question of when the plaintiffs were on notice was a question of fact. Nevertheless, the trial court concluded, erroneously that this question of fact could be decided by the court. The Court of Special Appeals accepted that premise so that it reviewed the circuit court's summary judgment under the inapplicable standard of whether the trial judge's "fact-findings" were clearly erroneous. The circuit court, making a credibility determination, rejected, as "arbitrary and contrived," [plaintiffs'] account of how discovery had come about. The trial judge said that there were substantial "limitations-related facts on which this court can base a determination that plaintiffs' cause is barred by limitations." She then found that "on the basis of inference which reasonable persons would have drawn from the news reports," the plaintiffs . . . "at least have been put on notice to investigate the alleged wrongs more than three years before their suit was filed." The Court of Special Appeals affirmed as to [two of the plaintiffs] on the grounds that "limitations is still a matter for the judge rather than the jury even if the facts concerning discovery are disputed." O'Hara v. Kovens, 60 Md.App. at 629, 484 A.2d at 280. These holdings cannot be reconciled with fundamental summary judgment law.

O'Hara, 503 A.2d at 1320-21. See also, Petri v. Smith, 453 A.2d 342, 347 (Pa.Super.Ct. 1982) (The standard of reasonable diligence under the discovery rule "may be best determined by the collective judgment, wisdom, and experience of jurors who have been selected

at random from the community whose standard is to be applied.")

In the instant case, genuine issues of fact exist as to whether the disclosure allegedly made by Webb was sufficient to place defendants or defendants' predecessors in interest on notice of the possible usurpation of a corporate opportunity by him. The determination of whether an adequate disclosure was, in fact, made and whether the disclosure gave notice of the wrongs allegedly committed by Webb involve critical questions of fact that must be submitted to the trier of fact. The record in the instant case demonstrates that Webb admitted in his own deposition that he did not disclose to anyone at Galaxy Advertising that he had an option to purchase a majority interest in Palmer Outdoor Advertising prior to the consummation of the deal. (R. 1022 at pp. 62, 73). Webb has also admitted that his eventual disclosure to the board of directors may not have constituted a full disclosure. (R. 1022 at pp. 20-25, 60-62,70-75).

The record also demonstrates that the other directors of Galaxy Advertising were unaware of Webb's purchase of an interest in Palmer Outdoor Advertising. (R. 1023 at pp. 8, 10, 32-35). George Hatch, a director of Galaxy Advertising, testified that Webb did not disclose the extent of his interest in Palmer Outdoor Advertising. Id. Furthermore, the affidavits submitted by defendants also demonstrate that a question of fact exists as to the nature and adequacy of the disclosure allegedly made by Webb. (R. 607-11).

CONCLUSION

Based upon the state of the record before the trial court, the trial court erred in failing to find that genuine issues of material fact existed as to the nature of the alleged disclosure made by Webb to the board of directors of Galaxy Advertising. As a result, the trial court erred in finding as a matter of law that Webb was entitled to an order of partial summary judgment, dismissing R.O.A.'s counterclaim for usurpation of a corporate opportunity. The actions of the trial court should be reversed and remanded for resolution by the trier of fact.

Dated this 6th day of December, 1989.

STRONG & HANNI

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CERTIFICATE OF HAND DELIVERY

I hereby certify that four true and correct copies of the foregoing Appellants' Reply Brief was hand delivered, this 8th day of December, 1989, to the following:

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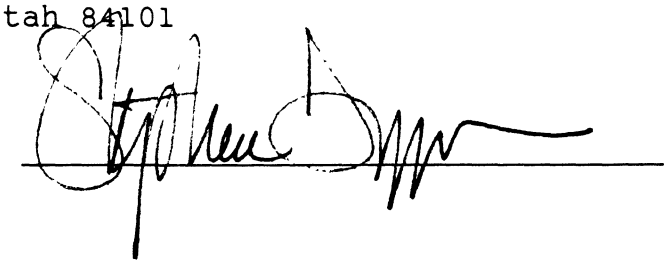

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HAND-DELIVERED

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Re: Webb v. R.O.A. General, Inc.
No. 890170-CA and No. 890164-CA

Gentlemen/Ladies:

Pursuant to Rule 24(j), Utah Rules of Appellate Procedure, we hereby submit the following authorities that have recently come to the attention of Respondent Roland Webb's current counsel, who was not involved in the preparation of the briefs on appeal:

Case No. 890170-CA

1. Admissibility of Extrinsic Evidence to Determine Completeness of Integration. Although not a recently discovered authority, Webb desires here to correct the statement of law set forth on page 13, footnote 1 of Respondent's Brief. The correct quotation from ***Bullfrog Marina, Inc. v. Lentz***, 28 Utah 2d 261, 501 P.2d 266, 270 (1972), is as follows:

> In determining the issue of the completeness of the integration in writing, evidence extrinsic to the writing itself is admissible.

2. Inadmissibility of Extrinsic Evidence to Add Terms Inconsistent With Partial or Total Integration. During oral argument, Webb's counsel referred to the admissions by R.O.A. General, Inc. ("R.O.A.") and William Reagan ("Reagan") that the two documents attached to the Amended Complaint ("Employment Agreement," dated August 1, 1981 and July 7, 1981 letter from Roland Webb to William Reagan) constitute at least a partial integration of a final, binding agreement. (See R.O.A.'s Answer to Amended Complaint, R. 203-04, para. 7, and Reagan's Answer to Amended Complaint, R. 275, para. 8.) Webb's counsel further argued that because the writings constitute at least a partial integration, terms inconsistent with the written terms cannot be

added through the introduction of parol evidence. With respect to that issue, the following three authorities are dispositive:

> ***Stanger v. Sentinel Sec. Life Ins. Co.***, 669 P.2d 1201, 1205 (Utah 1983) (quoting 30 Am.Jur.2d, Evidence § 1043):
>
> > The doctrine of partial integration is that where a written contract is obviously not, or is shown not to be, the complete contract, parol evidence not inconsistent with the writing is admissible to show what the entire contract really was, by supplementing, as distinguished from contradicting, the writing. In such a case parol evidence to prove the part not reduced to writing is admissible, although it is not admissible as to the part reduced to writing. (Emphasis added.)
>
> Restatement (Second), Contracts § 215:
>
> > Except as stated in the preceding Section [not relevant here], where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.
>
> Calamari & Perillo, ***The Law of Contracts*** (West Publishing Co. 1970), p. 77, Sec. 40:
>
> > A distinction is drawn between a total and a partial integration. Where the writing is intended to be final and complete, it is characterized as a total integration and may be neither contradicted nor supplemented by evidence of prior agreements or expressions. But where the writing is intended to be final and incomplete, it is said to be a partial integration; although such a writing may not be contradicted by evidence of prior agreements or

> expressions, it may be supplemented by evidence of consistent additional terms. (Emphasis in original.)

The reason for the supplemental citation of the above authorities is that the dispositive issue of partial integration is not addressed in the briefs.

3. Covenant or Condition? With respect to the argument as to whether there is a genuine issue of material fact concerning whether R.O.A. can be excused from its obligations to pay the compensation promised to Webb by reason of a purported breach of the "best efforts" provision of the Employment Agreement (see Brief of Appellants, pp. 2-4; Brief of Respondent, p. 11; Appellants' Reply Brief, pp. 2-4), the following authorities are significant:

> ***Barnes v. Wood***, 750 P.2d 1226, 1232 (Utah App. 1988):
>
> > The case law overwhelmingly favors the construction of a promise as a covenant as opposed to a condition precedent when the language is ambiguous.
>
> ***Porter v. Groover***, 734 P.2d 464, 465 (Utah 1987):
>
> > Whether a promise is conditional depends upon the parties' intent, which is derived from a fair and reasonable construction of the language used in light of all the circumstances when the parties executed the contract.
>
> ***Kimball v. Campbell***, 699 P.2d 714, 716 (Utah 1985).
>
> ***Creer v. Thurman***, 581 P.2d 149, 151 (Utah 1978):
>
> > Whether a provision in a contract is a condition, the nonfulfillment of which excuses performance, depends upon the intent of the parties, to be ascertained from a fair and reasonable construction of the language used in light of all the

> circumstances when they executed the contract.

Cheever v. Schramm, 577 P.2d 951, 953 (Utah 1978):

> A simple statement or stipulation in a contract is not necessarily a condition to a party's duty of performance. The intention to create a condition in a contract must appear expressly or by clear implication.

The reason for the supplemental citation of the above authorities is that the language in the written employment agreement provides that (1) the agreement cannot be terminated by R.O.A. for any reason other than fraud or gross malfeasance, and (2) the obligation of R.O.A. to pay Webb's compensation is "non-cancellable for any reason, including death;" therefore, the "best efforts" provision cannot be a condition, the breach of which would excuse performance by R.O.A. of its obligations to pay Webb's compensation. The distinction between covenants and conditions was not addressed in the briefs, but was discussed during oral argument.

Case No. 890164-CA

Running of the Statute of Limitations. R.O.A. asserts there is a genuine question as to whether the three year statute of limitations under Utah Code Ann. § 78-12-27, applicable to the claim that Webb usurped corporate opportunities by obtaining an interest in Palmer Outdoor Advertising, commenced running prior to three years before the filing of the Counterclaim, July 1987. That assertion is made notwithstanding William Reagan's Affidavit (R. 611, para. 5), where he states that "in June of 1981" he was informed "that Mr. Webb had previously obtained 51% of Palmer Advertising in Wyoming, surreptitiously." (Emphasis added.)

Arguments concerning that issue are found in Brief of Appellants, pp. 11-15; Brief of Respondent, p. 7-10; Appellants' Reply Brief, pp. 2-6.

A pertinent and significant authority, not cited in the briefs, respecting the "discovery rule" under the applicable statute of limitations is ***Stewart v. K&S Co., Inc.***, 591 P.2d 433, 435 (Utah 1979):

> [W]here there is a fiduciary relationship . . . the statute of limitations does not begin to run until the [plaintiff] discovers, or in the exercise of reasonable care should discover, that there is a wrong to be complained of . . .

Pursuant to Rule 24(j), seven copies of this letter are enclosed herewith.

Very truly yours,

Ross C. Anderson

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cc: Philip R. Fishler, Esq.
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